REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

01/11/2017

CASE NUMBER: A677/2016

In the matter between:

RICHARD MLAMBO **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

KUBUSHI, J

INTRODUCTION

[1] The appellant was arraigned for trial in the Gauteng Regional Court, held at Vereeniging, on one count of the rape of a five (5) year old girl ("the complainant"). The contravention was in terms of s 3 of the Sexual Offences Act 32 of 2007 read with s 51 (1) of the Criminal Law Amendment Act 105 of 1997. The trial court found the appellant guilty as charged and subsequently, having found substantial and compelling circumstances justifying deviation from the prescribed minimum sentence of life imprisonment sentenced him to a term of twenty five (25) years imprisonment. The appellant is before us on sentence only, leave to appeal having been granted by the trial court.

[2] At the trial, the appellant pleaded guilty and in his plea explanation he admitted that on the day in question he met the complainant on the street. He picked her up and took her to nearby bushes where he undressed her panties and put his penis in her vagina, thus, raping her. After he finished, he accompanied her and along the way he met a group of people who asked her about the girl. He ran away. The people chased after him and arrested him.

[3] The only basis for the appeal is that the sentence of twenty five (25) years imprisonment imposed by the trial court is shockingly harsh and inappropriate.

THE ISSUE

[4] The crux is whether the sentence of twenty five (25) years imprisonment imposed against the appellant is shockingly harsh and inappropriate.

THE LAW

[5] It is trite that punishment is pre-eminently a matter for the discretion of the trial court. The court on appeal is not to erode such discretion. On appeal no general right exists to interfere with a sentence imposed by the trial court. The appeal court will interfere only if the discretion has not been judicially and properly exercised. This will be so only where the sentence is vitiated by an irregularity or misdirection or is disturbingly inappropriate. Therefore, there must be material misdirection on the part of the trial court in order to justify interference with the sentence.[1]

[6] It is also trite that, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as 'shocking', 'startling' or 'disturbingly inappropriate.' The test, in this regard, is whether the sentence imposed induces a sense of shock, that is to say, whether there is a striking disparity between the sentence passed and that which the court of appeal would have imposed.[2]

ANALYSIS

[7] Counsel for the appellant used comparative judgments in trying to convince us that the sentence imposed by the trial court is shockingly harsh and inappropriate. We were referred to comparative judgments wherein the accused were also, as in this instance, convicted of the rape of young girls between the ages of four years and

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[1] See S v Packereysammy 2004 (2) SACR 169 (SCA) para 5.

[2] S v De jager & Another 1965 (2) SA 616 (A) at 628H – 629.

seven years and the court having found substantial and compelling circumstances justifying deviation from the prescribed sentence of life imprisonment imposed lesser sentences than in the current case, that is, 20 years instead of 25 years imprisonment.[3] In this sense, according to counsel, the 25 years imprisonment sentence imposed by the trial court, is harsh and induces a sense of shock.

[8] Counsel conceded in argument before us that a court of appeal is not bound by comparative judgments as every case is unique and should be treated on its merits. However, relying on the judgment in *S v Mcmillian*,[4] wherein it was stated that divergent sentences for similar cases were not ideal in any criminal justice system, counsel sought to use those cases to persuade us to find that there was misdirection on the part of the trial court in passing such a sentence. Counsel implored us to interfere with the sentence and to reduce it along the lines of the sentences in the comparative judgments.

[9] I find myself unable to align myself with counsel's argument in this regard. I hold a firm view that the sentence of the trial court is neither harsh nor shocking and is appropriate in the circumstances of this case. The trial court did not, in any way or as suggested by the appellant misdirect itself.

[10] When considering sentence the trial court found the following factors to be substantial and compelling warranting deviation from the prescribed minimum sentence of life imprisonment: that the appellant was at 35 years of age a first

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[3] See S v Rooiberg 2015 JDR 0740 (ECG), S v Ngwenya 2014 JDR 1620 (GP) and S v Calvin 2014 JDR 2020 (SCA).

[4] 2003 (1) SACR 27 (SCA) para 10

offender, he pleaded guilty, was gainfully employed and the fact that the complainant did not suffer any serious injuries.

[11] The trial court did not lose sight of the factors in aggravation of sentence like, the seriousness and gravity of the offence of rape particularly when perpetrated against a child as young as the complainant; the prevalence of the offence of rape; the impact and/or effects of the offence on the complainant and the interest of society in offences of this nature. I find such factors grievous enough to have overshadowed the mitigating factors in favour of the appellant and warrant the imposition of the sentence the trial court has meted out.

[12] In addition to these factors the respondent's counsel has requested us to consider further factors like the fact that the appellant's plea of guilty was a mere repetition of the wording of the charge sheet. The appellant had in any event to plead guilty – the evidence was stacked against him. He was found in the presence of the child and was immediately apprehended.

[13] Luckily in this instance a victim impact report, though not satisfactory, was commissioned. The report shows that the complainant has been negatively impacted by the rape. I take note of the submission by the appellant's counsel that only facts which have been pleaded by the appellant should be considered when considering sentence. However, the victim impact report was handed in by consent between the parties and thus forms part of the record. Any information in the victim impact report could as such be used as evidence against the appellant. It is reported that shortly after the incident the complainant started isolating herself and became withdrawn; she has become extremely paranoid and spends most of the time in the yard and is always warning her friends against men on the street; when she is shouted at she

runs and hides herself and would cover her head and ears with her hands. As the trial court found, it cannot at this stage be determined to what extent she has been affected and how long the psychological injuries will last.

[14] The rape of children remains one of the horrific offences that continue to trouble our country. The offence is not subsiding even though the Minimum Sentences Act is applied to its maximum. Children remain vulnerable and in danger of being attacked, abused and raped and sometimes end up dead, on a daily basis. The younger they are the more vulnerable. The community is looking up at the courts as the last resort and expect protection. People like the appellant must be removed from society. They must be kept away from our streets where children play.

[15] I find that the comparative judgments do not advance counsel's argument. It is trite that from a jurisdictional point of view it is good practice to look at other similar cases when considering sentence, but, sight should not be lost that this is only just for guidance and nothing else. Each case is unique and must be considered on its own set of facts. Safe for the fact that the accused in this instance and the accused in the judgments quoted by counsel for the appellant were convicted of the rape of young girls in the region of four to seven years, there are no other similarities between the cases. Each case, viewed on its merits differs from the other.

CONCLUSION

[16] With that background in mind, I am of the view that the sentence the trial court imposed does not require to be interfered with. The sentence is not in any way shocking and it is a sentence I would have imposed if I had tried the matter. It is an appropriate sentence befitting the offender and the offence and is in the interest of

society. There is no need to interfere with the trial court's discretion and the appeal ought to be dismissed.

ORDER

[17] In the circumstances, I make the following order:

1. The appeal on sentence is dismissed.
2. The conviction and sentence imposed by the trial court are confirmed.

E.M. KUBUSHI
JUDGE OF THE HIGH COURT

I concur

E. PHIYEGA
ACTING JUDGE OF THE HIGH COURT

Appearances:

On behalf of the appellant:	Mr. H. Steynberg Instructed by: **PRETORIA JUSTICE CENTRE** 2nd Floor FNB Building 206 Church Street PRETORIA 0001
On behalf of the respondent:	Adv F.W. Van Der Merwe Instructed by: **DIRECTOR OF PUBLIC PROSECUTIONS** Presidential Building 28 Church Square PRETORIA 0001